IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1946

No. 1134

CENTRAL STATES ELECTRIC COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION

COLORADO INTERSTATE GAS COMPANY,
a corporation

vs.

FEDERAL POWER COMMISSION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

JO V. MORGAN,
Attorney for Petitioner.

DON BARNES,
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INDEX

Table of Authorities

CASES

STATUTES

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States

The petition of Central States Electric Company (hereinafter called "Central") respectfully shows:

I.
SUMMARY STATEMENT OF THE MATTER INVOLVED

During the period from May 20, 1942 to October 20, 1945, Colorado Interstate Gas Company (hereinafter called

"Colorado") sold natural gas to Natural Gas Pipeline Company of America, for which gas it charged rates that were in effect prior to the order of the Federal Power Commission of March 18, 1942.

Natural Gas Pipeline Company (hereinafter called "Pipeline") mixed and comingled said gas with other gas obtained by it from other sources and transported and resold said gas so purchased to its customers, including Central States Electric Company. Central States Electric Company (hereinafter called "Central") was during said period engaged in the utility business in the State of Iowa and elsewhere. (R. 78-80)

The gas purchased by Central from Pipeline was in turn distributed and resold to its customers in the towns of Greenfield, Knoxville and Pella, Iowa. (R. 78-80)

After March 18, 1942, the Federal Power Commission entered orders requiring a reduction in the rates of natural gas sold by Colorado to Pipeline (R. 3-5) and thereafter, Colorado sought a review of said order in the United States Circuit Court of Appeals for the Tenth Judicial Circuit (Cause No. 2550 - Colorado Interstate Power Co., a corporation, Petitioner vs. Federal Power Commission et al., Respondents). The orders of the Federal Power Commission reducing the rates and charges of Colorado were stayed on review thereof by the Tenth Circuit Court of Appeals and during such stay and between May 20, 1942 and October 20, 1945, Colorado continued to charge and collect from Pipeline the rates in effect prior to said order and said Court, as an incident to the stay, required the deposit with it of a fund, computed in relation to the reduction ordered but not in fact made, to indemnify all interested parties should said order be affirmed, which fund is held by said Court. (R.-19) R.-3-5)

Thereafter, the United States Circuit Court of Appeals for the Tenth Judicial Circuit affirmed the rate orders of the Federal Power Commission (R. 3) and of

the principal sum deposited with said Court allocated the sum of $2,334,319.02 as properly allocable to sales of natural gas by Colorado to Pipeline during the period from May 20, 1942 to October 20, 1945. (R. 10)

The Circuit Court of Appeals for the Tenth Circuit then requested that certain plans for the distribution of said fund be submitted to the Court. Thereafter, the Illinois Commerce Commission filed with the Court a document captioned "Plan of Illinois Commerce Commission for Distribution of Impounded Fund", together with an additional document explanatory thereof, entitled "Memorandum of Illinois Commerce Commission in Support of Its Plan." (R. 19) (R. 27)

On July 27, 1946, the Clerk of the United States Circuit Court of Appeals Tenth Circuit mailed to Central States Electric Company a copy of letter addressed to Warren Henry, Chief Engineer of the Illinois Commerce Commission, advising that the plan of the Illinois Commerce Commission for distribution of the impounded fund as allocated to the Natural Gas Pipeline Company of America had been set for hearing at Denver, Colorado, on August 16, 1946. (R. 28)

After the hearing on August 16, 1946, and on August 17, 1946, the Court of Appeals filed an Opinion by the terms of which Opinion it found among other things that:

> "Pipeline on January 9, 1946, filed a supplemental F. P. C. Gas Schedule effective on all bills rendered to its purchasing utility companies (including Central) on and after May 20, 1942, and prior to October 20, 1945, to reflect the reduction in cost of gas purchased by Pipeline from Colorado and represented by impounded funds under the control and custody of the Circuit Court of Appeals for the Tenth Circuit as follows:
>
> | Name of Purchaser | Reduction |
> |---|---|
> | Central States Electric Company | $8,612.58" (R. 47) |

In reference to the Plan of the Illinois Commerce Commission for distribution of the impounded fund, the Court found:

> "That said Plan should be made applicable to the distribution of the sums set forth in Paragraph 4 of these findings as to the quantity of gas received by Central States Electric Company et al." (R. 54)

and further found that the Central States Elecric Company, et al., had due and timely notice

(1) of the Plan for Distribution of impounded funds to ultimate consumers submitted by the Illinois Commerce Commission, and

(2) of the hearing before this Court upon such Plan on August 16, 1946; that the five gas distributors named in this paragraph have not filed any objection to such proposed plan of distribution to ultimate consumers, and no one appeared on their behalf at the hearing before this Court on August 16, 1946, to object to such Plan of Distribution. (R. 13)

The Court further found that:

> "Said plan of the Illinois Commerce Commission is fair and equitable and provides for a proper, feasible, fair and equitable distribution of that portion of said impounded fund, derived from or accumulated by virtue of sales of the natural gas during the period from May 20, 1942 to October 20, 1945, by Colorado Interstate Gas Company at the gates of sale to Natural Gas Pipeline Company of America, allocable, as found above, to the quantities of natural gas received by each of said Illinois utility distributing companies, Northern Indiana Public Service Company, Iowa-Illinois Gas and Electric Company, *Central States Electric Company*, City of Nebraska City, Iowa Power and Light Company, United Gas Service Company, and Iowa Nebraska Light and Power Company, all of which are distributors of gas to ultimate consumers and are hereinafter referred to as distributing companies, said plan is also proper, feasible, fair and equitable with respect to the natural gas resold and

distributed by said Illinois utility distributing companies, said Norhern Indiana Public Service Company, said Iowa-Illinois Gas and Electric Company, said *Central States Electric Company,* said City of Nebraska City, said Iowa Power and Light Company, said United Gas Service Company, and said Iowa Nebraska Light and Power Company, respectively, to the ultimate consumers thereof in the respective states in which said utility distributing companies distributed said natural gas." (R. 54)

The Court ordered that the sum of $8,612.58 hereinabove allocated to the quantities of gas sold by Pipeline to Central States Electric Company, et al., during the period from May 20, 1942 to October 20, 1945, respectively belong to and are the property of the eligible customers of said companies (including Central) as herein defined. (R. 59)

The Order further provided:

"The Court reserved and retains jurisdiction of this cause, the parties hereto, and the impounded funds for the purpose of such other and further orders and decrees herein as may be necessary, suitable or appropriate in the premises, including any order necessary to protect said pipeline companies and all of said distributing companies named in the order against any Federal tax liability growing out of the subject matter of the order. (R. 28)

"It is Further Ordered that a copy of this order be served by mail upon each of the persons, corporations, and commissions named in paragraph 1 of the findings hereof; that this order shall be final and binding as to all companies named in paragraphs 4 and 10 of the findings hereof (Central being named in said paragraphs), as well as all other persons claiming an interest in the funds which are to be distributed pursuant to the terms of this order, unless within fifteen (15) days from the date of this order such persons or companies file appropriate objections in writing showing why this order shall not be binding as to them." (R. 28-9)

In making the aforesaid finding which in effect adopt

ed the plan of the Illinois Commerce Commission, the Court of Appeals assumed jurisdiction to review the contractual relations between the local distributors and ultimate consumers and to adjudge their respective legalities in and to the fund in question, presumably on the conclusion that the rates charged to the ultimate consumers during the period in question in all events, included the excessive rates paid by the local distributors during that period to the Natural Gas Companies. In fact, the Court of Appeals by determining what the contractual relations between the local distributors and ultimate consumers were, or should have been during the refund period, and by finding that the refund belonged to the ultimate consumers assumed jurisdiction to and did retroactively reduce the local rates of the local distributors during the refund period. This determination was made and declared by the Court to be generally binding on all local distributors, even though Central was not then a party to the cause, even though the plan of the Illinois Commerce Commission did not purport, or even suggest to distribute any of the funds allocated to Central and even though Central had never by any means agreed to a reduction of the rates which it charged its customers.

On October 23, 1946, Central filed in the United States Circuit Court of Appeals for the Tenth Judicial District, a Motion to reopen this cause and for leave to file a Petition of Intervention (R. 72) and attached thereto its Petition of Intervention in which it specifically alleged that it had never received any formal, adequate or legal notice of the hearing held on August 16, 1946; that the letter of the said Warren Henry referred to above could not constitute any notice to Central for the reason that the proposed plan of distribution of the impounded fund was drawn up "particularly with reference to utilities and customers in Illinois", (R. 20)
and that since said proposed plan of Illinois Commerce

Commission for distribution of a portion of the impounded fund did not purport to refer to that portion of the fund allocated to Central, and since said plan did not mention or refer to Central in any manner and since said plan on its face appeared to be only a plan to distribute a portion of said impounded fund, to-wit: that portion distributed by the Illinois Companies and since said plan did not inform or state that it would affect any of the fund allocated to Central or require Central to appear and protect its interests, that said letter and proposed plan could not possibly constitute notice to Central. (R 19) (R. 27)

Central further alleged that the Circuit Court of Appeals was without jurisdiction to enter any finding and order as to Central for all of the reasons aforesaid and for the further reason that Central was an Iowa Company; that all of the gas purchased by it from Pipeline was sold and distributed to its customers in Iowa; that its rates for the sale of gas to its customers in Iowa were fixed by the law of the State of Iowa; and that the order of the Court directing distribution of the refund to the customers of Central was contrary to the decision of this Court rendered on the 12th day of February, 1945, in the case entitled "Central States Electric Company vs. City of Muscatine, Iowa, et al., 324 U. S. 138-153, 89L. Ed. 801, 65 Supreme Court 565. Said Petition of Intervention further averred that the Circuit Court was without jurisdiction to find that

> "said plan is also proper, feasible, fair and equitable with respect to the natural gas resold and distributed by said Illinois utility distributing companies, and said Central States Electric Company, respectively, to the ultimate consumers thereof in the respective states in which said utility distributing companies distributed said natural gas"

for the reason that Central is in fact an Iowa Corporation

and that all of the gas purchased by it from Pipeline was resold and distributed to its customers in Iowa. That all of its customers are located in the State of Iowa, and that its rates for the resale of said gas to its customers are fixed by the laws of the State of Iowa; and that the said finding and order of this Court directing the distribution of the refund direct to the customers of Central is contrary to the mandate and decision of the United States Supreme Court hereinabove cited and that the Circuit Court is without jurisdiction to make an order for the distribution of the funds allocated to Central for that reason. (R. 78-9)

Said Petition of Intervention further alleged that the Circuit Court was without jurisdiction to enter any order to award the impounded fund to the ultimate customers of Central, since such an award would amount to a retroactive reduction of local rates which is not authorized by the provisions of the Natural Gas Act. (R. 81)

Said Petition of Intervention further alleged that under the Iowa Statutes the power to fix local rates for the sale of gas by private public utilities is vested in the municipality served. (R. 78-9)

The Motion of Central to reopen this cause and for leave to file a Petition of Intervention was duly set and came on for hearing on the 17th day of December, 1946, and the Circuit Court thereupon and forthwith entered an order in which it found that on July 27, 1946, the Clerk of the Court mailed to Central a copy of the letter addressed to Warren Henry, Chief Engineer, Illinois Commerce Commission, advising that the plan for distribution of the impounded fund allocated to the Natural Gas Pipeline Company of America had been set for hearing at Denver, Colorado on August 16, 1946. (R. 90)

The Court further found that a copy of the order of Court dated August 17, 1946, was mailed to Central by registered mail and that the return receipt shows that a

copy of said decree was received by Central on August 22, 1946. (R. 90)

The Court further found that Central did not take any steps with respect to the decree of August 17, 1946, entered in this cause within the fifteen (15) days period as required by said decree and that no motion or other proceeding was filed in that Court until October 23, 1946. (R. 90)

The Court, upon these findings, denied the Motion of Central to reopen this cause and denied the application of Central to file Petition of Intervention. (R. 91)

II.

JURISDICTION.

The order and decree of the Circuit Court entered on August 17, 1946, directed that said sum of $8,612.58 be paid to the eligible customers of Central. Central filed its motion to reopen said cause and for leave to file Petition of Intervention on October 23, 1946, and the same was denied by order entered on December 17, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347a). It is contended that the Supreme Court has jurisdiction to review the judgment herein questioned because:

1. The denial of Central's Petition to Intervene was such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

2. The opinion of the Circuit Court of Appeals decided a federal question in conflict with the decision of this Court in the case of Central States Electric Company vs. Muscatine, Iowa, et al., (324 U. S. 138, 153; 89 L. Ed. 801, 65 Supreme Court 565).

3. The opinion of the Circuit Court of Appeals is an invasion of the right of the State of Iowa to fix local rates for the sale of gas in the State of Iowa.

III.

QUESTIONS PRESENTED.

1. Whether under the Natural Gas Act a purchaser at wholesale of natural gas from a Natural Gas Company is entitled as a matter of legal right to assert its claim to a refund which has resulted from the payment of rates by the purchaser in excess of the rates fixed by an order of the Federal Power Commission during the period of a stay of such order by a Federal Court?

2. Where a Federal Court as an incident to the stay of a rate order of the Federal Power Commission requires the deposit with it of a fund to indemnify all interested parties should said order be affirmed on review, may the Federal Court upon affirmance of the rate order direct payment of such funds to the ultimate consumers and deny to the wholesale purchaser of such gas the right to intervene and assert its legal ownership to such funds before any disbursement has been made by the Court?

3. Whether under the Natural Gas Act a federal court can deprive a wholesale purchaser of natural gas from a natural gas company of the benefit of a valid rate reduction order of the Federal Power Commission by staying such order and after determining that such stay is erroneous, then direct that the fund representing the excessive rates paid by the wholesale purchaser to the natural gas company as a result of the stay, be turned over to the ultimate consumers of such gas and not returned to the wholesale purchaser.

4. Whether under the Natural Gas Act the Federal Court has jurisdiction to retroactively reduce rates be-

tween a wholesale purchaser of natural gas from a Natural Gas Company and the ultimate consumers of such gas by awarding to such consumers a fund deposited in the registry of the Court as the result of an erroneous stay of a valid order of the Federal Power Commission reducing rates between the Natural Gas Company and the wholesale purchaser.

5. Whether under the Natural Gas Act a Federal Court which has caused a fund to be deposited in its registry may thereafter refuse to determine the rights of adverse claimants to the fund who have never been directly informed of any hearing which could affect their rights to said fund.

6. Whether under the Natural Gas Act a Federal Court may direct a payment of a fund on deposit in its registry to parties not subject to its jurisdiction, which payment thereby effects a retroactive reduction of the local rate paid for such gas by said parties.

IV.

REASONS FOR ALLOWANCE OF THE WRIT

The jurisdiction and powers of the Court of Appeals are not only derived from but are limited by the terms of the Natural Gas Act. Section 1 (b) of this Act (15 U. S. C. 717 (b)) declares that the Act shall apply to the transportation and sale of natural gas in Interstate Commerce, but that it * * * "shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to facilities used for such distribution * * *"

In addition, this Honorable Court in the case of Central States Electric Company vs. City of Muscatine, Iowa, et al., 324 U. S. 138, 153; 89 L. Ed. 801; 65 Supreme Court 565, decided February 12, 1945, determined that a Federal Court was without jurisdiction under the Natural Gas Act

to make reparation awards to ultimate consumers of natural gas, especially when such action necessarily involved a finding that the rates paid therefor by such consumers were illegal and excessive and a determination equivalent to retroactively fixing local retail rates for such gas; that a Federal Court did not have jurisdiction to determine the reasonableness of or to fix the rates paid by ultimate consumers during the refund period since this function is reserved to the States and is not within the judicial power conferred upon Federal Courts by the Constitution; that a Federal Court was without jurisdiction to award the fund in dispute to ultimate consumers since the making of the award resulted not only in interference with the reserved power of the State of Iowa, but also with the legislative function to fix local retail rates and this Honorable Court, by that decision, recognized that the question of what is a proper rate to be paid by the ultimate consumers is a question exclusively in the field of the State regulation.

The gist of that opinion lies squarely within the wording:

> "We are of opinion that the Court below (Circuit Court) lacked jurisdiction to adjudicate the question of the consumers' rights to the fund in dispute."

In view of the provisions of the Natural Gas Act it would seem that the Court below in awarding the refund to Central's ultimate consumers and thereby reducing the rates between Central and such consumers during the refund period was exercising jurisdiction beyond, and in violation of, the express terms of the Natural Gas Act. In view of the decision of this Honorable Court in the case of Central States Electric Company vs. Muscatine, Iowa, et al., (supra) it would seem that the Court below has chosen to ignore the express mandate of this Court and has assumed jurisdiction to do the very thing which this Hon

orable Court has expressly denied that it could do. Therefore, the Court has not only so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, but it has decided a Federal question in direct conflict with the decision of this Court.

Further the opinion of the Circuit Court denying Central the right to intervene was a denial of a legal right to which Central was fairly entitled and which it could only obtain by intervention for the order of the Court effectively bars any further claim by Central. Since the rules of Federal Practice and Procedure (Rule 24 (a) 3) contemplates intervention "when the applicant is so situated as to be adversely affected by distribution or other disposition of property in the custody of the Court or of an officer thereof", the denial of this right is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision and is believed to conflict with the decision of this Court in Credits Commutation Company vs. U. S., 177 U. S. 311; 44 L. Ed. 782. The denial of Central's Petition of Intervention was made notwithstanding that:

(a) Central asserted a legal right to the refund in question;

(b) Central had no legal adequate notice that the Court contemplated any action which might affect that portion of refund allocated to Central;

(c) The Court was without jurisdiction to award any portion of the refund to the ultimate consumers of Central;

(d) Central's petition of intervention was timely in that the fund was in the registry of the Court and no disposition had yet been made thereof, nor would the rights of any of the parties be affected or prejudiced by the granting of the petition;

(e) The award as made was an invasion of the right of the State of Iowa to fix local rates for the sale of gas in the State of Iowa, in that it reduced the

rates for the sale of gas to the Iowa customers of Central for the period involved.

In view of the foregoing, the decision of the Court below is believed to be in conflict with the decision of this Court in Central States Electric Company vs. Muscatine, Iowa, et al (supra)

V.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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Don Barnes,
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BRIEF OF CENTRAL IN SUPPORT OF ITS PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals of August 17, 1946, appears at pages 41-69 of the record; its opinion of December 17, 1946, is at pages 90-91 of the record and is not officially reported.

JURISDICTION

The grounds upon which jurisdiction of this Court are invoked are stated under Division II at Page 10 of the foregoing Petition.

STATEMENT OF THE CASE.

A statement of the case is set forth under Division I at pages 1 to 10 of the foregoing Petition and the same is hereby adopted and made a part of this Brief.

SPECIFICATION OF ERRORS.

Errors intended to be urged are those specified in the Petition under Division III on pages 10 to 11 entitled "Questions Presented" the Court of Appeals having ruled adversely to Central or failed to rule upon the questions therein stated.

SUMMARY OF ARGUMENT.

A. The fund here in dispute belongs to Central as a matter of legal right.

B. Under the Natural Gas Act the Court of Appeals is without jurisdiction to award the refund to Central's ultimate consumers for this effected a retroactive reduction

in the rates paid by consumers and was an adjudication of a matter solely within the legislative competence of the State of Iowa.

C. It was the mandatory duty of the Court of Appeals to allow Central's petition of intervention.

ARGUMENT.

A. THE FUND HERE IN DISPUTE BELONGS TO CENTRAL AS A MATTER OF LEGAL RIGHT.

But for the entry of the stay order, the rate reduction ordered by the Federal Power Commission would have gone into immediate effect and the rates charged Central would have thereby been materially reduced during the period in question. This Court announced In The Matter of Lincoln Gas and Electric Company 256 U. S. 512, and in Arkadelphia Milling Company vs. St. Louis Southwestern Railway Company, 249 U. S. 134 that a party against whom an erroneous decree has been carried into effect is entitled, in the event of reversal, to that which he has lost thereby and that a bond posted for his benefit in the event the decree is reversed will be enforced according to its terms. In the instant case the money was paid into the registry of the Court as an incident to the stay order. Since Central was required to pay excessive rates for natural gas as a result of the erroneous stay by the Court of Appeals of the rate order of the Federal Power Commission and since that part of the fund in question has been determined to be the difference between what Central would have paid for natural gas under the reduced rate and what it actually paid during the period of the stay, certainly Central would be entitled to receive that portion of the fund allocated to it which resulted from the action of the Circuit Court. The

Natural Gas Act does not contain any provision indicating that rates charged the Natural Gas Companies in excess of rates fixed by the Federal Power Commission shall be refunded to the ultimate consumers. On the contrary, Section 4 (e) of the Act (15 U. S. C. 717c (e)) provides that:

> " * * * Where increased rates or charges are thus made effective, the Commission may, by order, require the natural gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. * * * "

The apparent purpose of the above requirement that the Commission keep accounts specifying by whom and in whose behalf such amounts were paid is to provide a record so that the refunds may be made to the persons who paid the excessive rates represented thereby. The Court of Appeals by denying Central's claim to the fund here involved and awarding the same to Central's ultimate consumers has failed to give any effect to the foregoing provision of the Natural Gas Act and has thereby decided an important question of federal law, which is believed to be contrary to the foregoing cases cited, as well as contrary to the decision of this Honorable Court in Central States Electric Company vs. Muscatine, Iowa, et al., (supra).

B. UNDER THE NATURAL GAS ACT THE COURT OF APPEALS IS WITHOUT JURISDICTION TO AWARD THE REFUND TO CENTRAL'S ULTIMATE CONSUMERS FOR THIS EFFECTED A RETROACIVE REDUCTION IN THE RATES PAID BY CONSUMERS AND WAS AN ADJUDICATION OF A MATTER SOLELY WITHIN THE

LEGISLATIVE COMPETENCE OF THE STATE OF IOWA.

The Court of Appeals in its order of August 17, 1946, assumed jurisdiction under the Natural Gas Act to determine that the ultimate consumers of Central were entitled to a refund payable out of the portion of said impounded fund as allocated to Central, without any evidence that the burden of excessive rates paid by the local distributors (including Central) during the period of the Court's stay order, was borne by the ultimate consumers thereof. Since the Court of Appeals awarded the fund involved to Central's ultimate consumers, the Court did thereby retroactively reduce the rates between Central, a local distributor, and its consumers.

This action of the Court appears to be contrary to the express provisions of the Natural Gas Act, and it appears to be contrary to and in direct disregard of the holding of this Court in the case of Central States Electric Company vs. Muscatine, Iowa, et al, (supra) wherein this Honorable Court said:

> "The Court below had no power as a Court of Equity to fix rates and as a Federal Court, had no power to adjudicate a matter within the legislative competence of Iowa."

The Natural Gas Act clearly discloses that though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to the regulation of sales in Interstate Commerce at wholesale, leaving to the States the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to State regulation is clear, not only from the language of the Act, but from the exceptionally explicit legislative record, and from this court's decisions.

See:

Public Utilities Commission vs. United Fuel Gas Co., 317 U. S. 456, 467; 87 L. Ed. 396, 402; 63 Sup. Ct. 369;

Federal Power Commission vs. Hope Natural Gas Co., 320 U. S. 591, 609, 610; 88 L. Ed. 333, 349; 64 Sup. Ct. 281.

The Court further said:

"We are of the opinion that the Court below lacked jurisdiction to adjudicate the question of the consumers' rights in the fund in dispute."

The action of the Court below appears to be contrary to the decision of this Court in Central States Electric Company vs. Muscatine, Iowa, et al, (supra)

C. IT WAS THE MANDATORY DUTY OF THE COURT OF APPEALS TO ALLOW CENTRAL'S PETITION OF INTERVENTION.

In granting the stay of the rate order of the Federal Power Commission, the Court as an incident to the stay required the deposit with it of a fund computed in relation to the reduction order, in order to indemnify all interested parties should said order be affirmed, which fund was held by said Court and which fund was thereafter ordered distributed to Central's consumers. Central was not a party to the original proceedings. However, it paid the rate which produced the fund. After the fund was acquired by the Court and while it was retained in its registry the Court requested of the parties then before the Court, suggestions as to a plan of distribution and the Illinois Commerce Commission in response did suggest a plan as to the disposition of that portion of the fund which was properly allocable to the Illinois Companies and pursuant to the order of the Court, Central was furnished with a copy of said plan and of a Memorandum of the Illinois

Commerce Commission in support of its plan. In the letter accompanying the plan and memorandum, Warren Henry, the Chief Engineer said:

> "I am enclosing for your information a statement of a proposed plan of distribution of the impounded fund that has been drawn up, particularly with reference to utilities and customers in Illinois."

Later Central was advised that said plan would come on for hearing on August 16, 1946. Since the plan did not purport to distribute any portion of the fund allocated to Central and since the plan only contemplated the distribution of the funds allocated to the Illinois Distributing Companies, Central was not advised in any way that the Court proposed to or would take any action which might affect Central or its interest.

After the entry of the order on August 17, 1946, assuming that Central did receive a copy of this order on August 22, 1946, it had less than ten days within which to determine the effect of the order and to determine what steps it would be necessary to take to protect is interests. Furthermore, Central being a party to the case of Central States Electric Company vs. Muscatine, Iowa, et al., (supra) believed that its rights were fully protected by the determination of this Honorable Court in that case. On Ocober 23, 1946, Central filed its Motion for Leave to file Petition of Intervention in this cause, at which time no distribution had been made of any part of the fund allocated to Central and at which time no person would have been prejudiced by the entry of an order granting leave to Central to file its Petition of Intervention. By its Petition of Intervention Central asserted its legal ownership to the fund in dispute.

Central, believing itself to be so situated as to be adversely affected by a distribution of the property in the custody of the Court to anyone else other than itself,

promptly sought intervention. This application was denied by the Circuit Court and its order is believed to be in conflict with the decision in the case of Credits Communtation Company vs. United States, 177 U. S. 311 at Page 316, wherein this Honorable Court said:

> "It is doubtless true that cases may arise where the denial of the right of a third party to intervene herein would be a practical denial of certain relief to which the intervener is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief."

It is believed that Central falls squarely within the above pronouncement. There is a fund in the Circuit Court undergoing administration, a portion of which fund has been allocated to Central. By the order of the Court an award of the fund is made to Central's customers. Central promptly asserted its right to intervene, which right has been lost by the denial of the Circuit Court. That portion of the fund so allocated to Central has not yet been disbursed and no party would have been prejudiced by permitting Central to offer evidence in support of its petition. Since the order of the Circuit Court finally disposes of Intervenor's claim denying him all right to relief, Central is now forever barred.

It is respectfully submitted that the prayer of the foregoing petition should be granted.

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APPENDIX

PERTINENT SECTIONS OF THE NATURAL GAS ACT (15 U. S. C. 717.)

Section 1. (15 U. S. C. 717.) (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transporation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ulimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2(6). (15 U. S. C. 717a (6).) When used in this chapter, unless the context otherwise requires—(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

Section 4. (15 U. S. C. 717c.) (a) All rates and charges made, demanded, or received by any natural-gas

company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes or service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating

plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any state, municipality, or state commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: Provided, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Com-

mission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

PERTINENT SECTIONS OF THE CODE OF IOWA OF 1946

Chapter 397

HEATING PLANTS, WATER OR GAS WORKS, AND ELECTRIC PLANTS.

397.28 Regulation of rate and service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light, or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light, or power for other necessary public purposes and to regulate and fix the rent or

rate for water, gas, heat, light, or power; to regulate and fix the rents or rates of water, gas, heat, and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution, or contract.

Chapter 420.

CITIES UNDER SPECIAL CHARTER.

420.120 Heating, water, gas, and electric plants. Sections 397.3 and 397.8 to 397.28 inclusive, are applicable to cities acting under special charters.

INDEX

CITATIONS

741061—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1134

CENTRAL STATES ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The court below filed no opinion. Its findings of fact and order with respect to the distribution of the money in which petitioner asserts an interest are set forth in the record (R. 36–58). Its order denying petitioner's subsequent motion to re-open the case and for leave to intervene sets forth the reason therefor (R. 72).

JURISDICTION

The order of the court below directing distribution of the money in which petitioner claims

an interest was entered on August 17, 1946 (R. 58). The order denying petitioner's motion to re-open and for leave to intervene was entered December 17, 1946 (R. 72). The petition for certiorari was filed on March 17, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In the course of a proceeding for the distribution of an impounded fund which had been accumulated pursuant to a stay pending review of a rate reduction order of the Federal Power Commission, the court below after hearing entered an order approving a plan of distribution of such fund, which order was to be final as to petitioner, among other enumerated companies, unless objections were filed within 15 days from the date thereof. Petitioner was notified by regular mail of the proposed plan and of the hearing and was served by registered mail with a copy of the order entered therein. Petitioner did not participate in the hearing, did not file objections to the order within the time allowed, and did not seek a rehearing within twenty days after the order became final as permitted by rule of court. Sixty-seven days after entry of the order, petitioner filed a motion to reopen the cause and for leave to intervene. The motion was denied four months after entry of the order, and the petition to this Court

for a writ of certiorari was filed on the last day of the period allowed for seeking review of the order denying the motion—long after expiration of the time for seeking review of the first order.

The question presented is whether petitioner, having delayed asserting his claim to the funds until after the order distributing those funds became final, may now secure a review of the court's refusal to entertain a collateral attack on its order.

STATEMENT

On March 18, 1942, the Federal Power Commission entered an order requiring Colorado Interstate Gas Company, an interstate pipeline company, to reduce its rates and charges for gas (3 F. P. C. 32; R. 9–10). The Company sought review of the order and, on May 16, 1942, secured a stay thereof conditioned on the impounding of all amounts collected in excess of the charges permitted by the order (R. 36–37). The Commission's order was sustained by the Circuit Court of Appeals for the Tenth Circuit and by this Court (*Colorado Interstate Gas Co.* v. *Federal Power Commission,* 142 F. 2d 943, 324 U. S. 581).

While the stay was in effect, $8,514,143.08 was deposited subject to further order of the court (R. 39). Of this amount, $2,334,319.02 represented excess charges collected from Natural Gas Pipeline Company, a natural gas company subject to the jurisdiction of the Federal Power Commission, engaged in supplying gas to local utility

companies (R. 39). Of this amount, $8,612.58 represents the sum allocable to quantities of gas sold to petitioner during the impounding period (R. 11–12, 50).

On April 27, 1946, a plan for distribution of that part of the impounded fund which had been collected from Natural Gas Pipeline Company was submitted to the court by the Illinois Commerce Commission (R. 17), and at the same time the plan was served on all parties, including petitioner (R. 31–33). While the plan suggested the appropriate basis for allocating all funds to the quantities of gas purchased through the local utility companies, the detailed provisions relating to ultimate payment to individual consumers related only to those companies, not including petitioner, which were subject to the jurisdiction of the Illinois Commerce Commission (R. 17–31). On July 27, 1946, the clerk of the court mailed to the interested parties, including petitioner, a copy of a letter addressed to Mr. Warren Henry, Chief Engineer, Illinois Commerce Commission, which recited that a hearing was to be held on the plan at Denver, Colorado, on August 16, 1946, and that a copy of such letter was being forwarded to all the parties in interest (R. 34–36).

The hearing was held as scheduled and, on August 17, 1946, the court entered findings of fact and an order in which, after listing the persons, including petitioner, to whom notice had been given (R. 37–38), it found that Central States

"had due and timely notice (1) of the Plan for Distribution of impounded funds to ultimate consumers submitted by the Illinois Commerce Commission, and (2) of the hearing before this Court upon such Plan on August 16, 1946," and had not "filed any objection to such proposed plan of distribution to ultimate consumers," and that "no one appeared" on its behalf at such hearing "to object to such Plan of Distribution" (R. 45–46). The court adopted the proposed plan for distribution of all the moneys involved, including the amount allocable to quantities of gas purchased by petitioner, to ultimate consumers rather than the local utility companies (R. 50–54). It further provided that its order was to be final unless appropriate objections by any party in interest were filed within 15 days from the date of the order (R. 58).

On August 19, 1946, the clerk of court forwarded a copy of the findings and order by registered mail to petitioner as directed by the order of the court. Although petitioner received the copy on August 22, 1946 (R. 59–60A), it took no action until October 23, 1946, when it filed a "Motion to Reopen this Cause and for Leave to File Petition of Intervention" (R. 61). On December 12, 1946, the Federal Power Commission filed objections thereto (R. 67). On December 17, 1946, the matter came on for hearing, and on the same day the court, after reciting petitioner's

failure to avail itself of the opportunity to be heard which had been afforded it, entered an order denying the motion (R. 72).

ARGUMENT

Insofar as the petition seeks to bring before this Court questions relating to the order of the court below, entered August 17, 1946, providing for the distribution of the impounded funds, it is unseasonably filed and should be denied. The petition was filed March 17, 1947, seven months after the entry of the order. Unless it is found that subsequent proceedings in the court below tolled the running of the three months in which a petition for a writ of certiorari might be filed, as provided by Section 8 of the Act of February 13, 1925, ch. 229, 43 Stat. 940, 28 U. S. C. 350, the statute bars review of the order.

If the steps taken to notify and make service upon petitioner were sufficient to make petitioner a party to the proceedings resulting in the order of August 17, 1946, and we think that they were, the subsequent proceedings in the court below did not stay the running of the time in which to apply for the writ of certiorari. A copy of the proposed plan on which the hearing was held was mailed to petitioner by the Illinois Commerce Commission on April 24, 1946 (R. 31–33). On July 27, 1946, a copy of a letter notifying the Illinois Commerce Commission that a hearing on the plan would be held in Denver, Colorado, on

August 16, 1946, was mailed to petitioner as an interested party (R. 34). If, as petitioner contends, this was insufficient to put petitioner on notice that its rights were to be affected by the adjudication, the defect was cured by sending to petitioner by registered mail a copy of the order which specifically disposed of the fund claimed by petitioner and provided that it would become final at the expiration of fifteen days unless objections were filed within that time (R. 72, 58). Petitioner suggests that since it did not receive the order until August 22, 1946, the ten days remaining was insufficient time within which to act (Pet. 20). However, petitioner made no effort to seek a rehearing within twenty days after the order became final as was permitted by the rules of the court.[1] Not until sixty-seven days after entry of the order and fifty-two days after time to file objections thereto had expired did petitioner file its motion to reopen and for leave to intervene (R. 72). It is well settled that the time within which to petition for a writ of certiorari may only be tolled by the filing of a timely petition for rehearing which is entertained by the court below. See *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498. We submit that petitioner was in fact a party to the proceedings by reason of the service of the order upon it and, having failed to

[1] Rule 24 of the Revised Rules of the United States Circuit Court of Appeals for the Tenth District, revised November 18, 1943.

protect its rights in the manner prescribed by the order and rules of the court below, it is barred from seeking review in this Court.

Petitioner seeks to avoid the consequences of its failure to make a timely appearance in the court below and to prosecute a seasonable application for review of the court's order by now purporting to seek review of the court's subsequent order denying petitioner's motion "to re-open this cause and for leave to file petition of intervention" (R. 72). This position presupposes that petitioner was not a party to the proceeding resulting in the order of August 17, 1946; therefore petitioner has no standing to have that order reviewed. *Posner* v. *Anderson,* 293 U. S. 531. But if petitioner was a party to the proceeding, its motion amounted to a collateral attack on the order which was not considered on its merits by the court below and consequently cannot be reviewed here (cf. *Isenberg* v. *Sherman*, 286 U. S. 547).[2]

Petitioner asserts, on the basis of dictum in *Credits Commutation Co.* v. *United States,* 177 U. S. 311, that since it claims an interest in the fund, its right to intervene was absolute and denial of its application is subject to review. Whether the right to intervene be regarded as absolute or within the discretion of the court, the

[2] For a discussion of the facts in that case see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, pp. 725–6.

court could only permit intervention by reopening a matter which had been finally adjudicated. While the court had power under Rule 60 (b) of the Federal Rules of Civil Procedure to reopen the proceedings to relieve a party of a judgment "taken against him through his mistake, inadvertence, surprise, or excusable neglect", no effort has been made in this case to show that petitioner was entitled to such relief. An application for relief under Rule 60 (b) is addressed to the sound discretion of the court and it is an abuse of that discretion to reopen a case after final judgment in the absence of an appropriate showing of the required circumstances. *Western Union Telegraph Co.* v. *Dismang,* 106 F. 2d 362, 364 (C. C. A. 10). Likewise, we think that regardless of the character of petitioner's alleged right to intervene, it was within the broad discretion of the court to deny the application as coming too late. See *White* v. *Hanson,* 126 F. 2d 559 (C. C. A. 10); *Baltimore Trust Co.* v. *Interocean Oil Co.,* 30 F. Supp. 484 (D. Md.). Since the decision on the motion was one which rested in the discretion of the court below, it is not open to review on writ of certiorari. *Credits Commutation Co.* v. *United States, supra,* and cases cited at 316–317.

Petitioner, in reliance upon *Central States Co.* v. *Muscatine,* 324 U. S. 138, implies that the order of August 17, 1946, is open to collateral attack because the court below lacked jurisdiction to make the order. Certainly the court had juris-

diction over the fund in its hands and had jurisdiction to dispose of that fund. Whether its action in disposing of the fund was correct is not now open to question in a collateral proceeding. Cf. *Isenberg* v. *Sherman*, 286 U. S. 547, and see Note 2, p. 8, *supra*.

CONCLUSION

The order of the court below was correct and does not constitute an abuse of discretion. There is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947